IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of KAREN L. FISCHER, Respondent, and BRUCE A. FISCHER, Appellant.	No. 36828-5-II Consolidated with 36875-7-II and 37505-2-II UNPUBLISHED OPINION

Hunt, J. — In this consolidated appeal, Bruce Fischer appeals several orders relating to the dissolution of his marriage to Karen Fischer.[1] Bruce argues that the trial court erred by (1) imposing domestic violence restrictions in the parenting plan, including allowing only supervised visitation, no decision-making authority, and domestic violence perpetrator treatment; (2) renewing the domestic violence protection order against him; and (3) entering certain post-trial orders. Both parties request attorney fees on appeal. We affirm the trial court's orders and award attorney fees to Karen.

Facts

Bruce and Karen were married on June 26, 1992. They have two minor children together. The parties separated on July 25, 2006. They dissolved their marriage on October 30, 2007. During the period between separation and post-dissolution, the trial court entered and renewed

[1] We refer to the parties by their first names for clarity; we intend no disrespect.

domestic violence protection orders.

I. Separation; Domestic Violence Protection Order; First Appeal

When the parties separated on July 25, 2006, Karen petitioned for a domestic violence protection order to restrain Bruce from contacting her or their children. That same day, a trial court commissioner granted Karen a temporary 14-day protection order.[2] On August 11, the trial court reissued and modified the temporary protection order to allow Bruce supervised visitation with the children.

On August 18, the court commissioner entered a one-year protection order restraining Bruce from contacting Karen or the children but still allowing Bruce supervised visitation with the children. The commissioner also ordered Bruce to undergo a domestic violence assessment. Since entering this August 18, 2006 one-year protection order, the trial court has modified and renewed it several times, including on September 5, 2007. On October 3, 2007, Bruce appealed the August 18, 2006 14-day order, a September 21, 2006 temporary restraining order, and the September 5, 2007 order renewing the one-year August 18 protection order.

On September 5, 2008, the trial court again renewed the August 18 protection order for an additional year. On September 8, the trial court amended the protection order to eliminate its application to the family home because Karen and the children no longer lived there.

[2] RCW 26.50.070 allows the court to grant a petitioner an ex parte temporary protection order for up to 14 days.

II. Dissolution; Domestic Violence Restrictions; Second Appeal

On August 4, 2006, Karen filed a petition to dissolve the marriage. During the five-day bench trial in August 2007, the major issue was whether the trial court should include domestic violence restrictions in the parenting plan.

Karen testified at length about Bruce's treatment of her, including Bruce's calling her names and shoving her. For example, she described in detail one morning when Bruce shoved her out of his home office and down the hallway, and swept all the items off her desk; later that morning, he shoved her against the corner of a wall, wrapped his hands around her neck, and threatened to kill her. Peg Cain, a licensed mental-health counselor working for a state-certified domestic violence treatment program, testified that she performed a domestic violence assessment on Bruce and recommended that Bruce complete a domestic violence treatment program. Dr. Mary Anne Trause, the parties' daughter's psychologist, testified about her treatment of the daughter during her parents' dissolution. Three supervisors who observed Bruce's visits with his children testified about their observations of the relationship between Bruce and the children, as well as their personal interactions with Bruce related to these visits.

Bruce testified that he never grabbed or shoved Karen but sometimes that he had to "push by" her because she blocked his path. He further testified that Karen was violent toward him and he felt he was a victim of domestic violence.[3] Several character witnesses testified on Bruce's

[3] Bruce introduced a January 18, 2005 journal entry in which Karen had written: "I feel B. likes me out of control and pushes and pushes. I slapped him and threw water on his body tonight. I truly feel I could lose my mind in this house with him." Ex. 145.

behalf. Mark Ricci, Bruce's childhood friend, testified that he once saw Bruce with scratches on his arm when Bruce arrived at Ricci's house after having an argument with Karen. No other testimony supported Bruce's assertion that Karen was violent toward him.

On October 4, the trial court entered the final parenting plan. The trial court found that Bruce had a history of domestic violence, as defined RCW 26.50.010(1). Based on this domestic violence finding, the trial court (1) ordered supervised visitation between Bruce and the children, (2) gave Karen sole decision-making authority for the children, and (3) ordered Bruce to complete a domestic violence perpetrator treatment program. Bruce appealed the parenting plan on October 17.

On October 30, the trial court dissolved the Fischers' marriage, entered a decree of dissolution, and ordered Bruce to pay child support to Karen. Bruce did not appeal the decree or the child support order.

III. Consolidation of Appeals and Third Appeal

On November 30, 2007, we consolidated Bruce's protection order and parenting plan appeals. On March 19, 2008, Bruce appealed a March 18 order in which the trial court had ordered Bruce to continue efforts to refinance the family home, denied Bruce's request to occupy the home, and addressed several other housekeeping matters. We consolidated this third appeal with Bruce's earlier appeals.

analysis

I. Parenting Plan

Bruce argues that the trial court abused its discretion by (1) imposing restrictions on his

residential time with his children; (2) denying him joint decision-making authority over his children; and (3) ordering him to complete a state-certified domestic violence treatment program. Bruce contends that the dissolution trial evidence was not sufficient to support the trial court's finding that he had a history of domestic violence, and that the restrictions were not reasonably calculated to address an identified harm. We disagree.

A. Standard of Review

We review a trial court's parenting plan decisions for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (citing *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 692 (1993)). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Littlefield*, 133 Wn.2d at 46-47. The trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, considering the facts and legal standard. *Id*. at 47.

The trial court bases its decision on untenable grounds if the record does not support its factual findings. *Id*. The trial court bases its decision on untenable reasons if it applies the incorrect legal standard or the facts do not meet the requirements of the correct legal standard. *Id*. We do not review the trial court's credibility determinations. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008) (citing *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003)).

B. Record Supports Domestic Violence Finding

RCW 26.50.010(1) defines "domestic violence" as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or

household members." Spouses are "family members." RCW 26.50.010(2).

The trial court found that Bruce had engaged in a "history of domestic violence" as defined in RCW 26.50.010(1). In its oral ruling, the trial court explained:

> The history of domestic violence upon which I rely is [Karen's] testimony about her treatment within the marriage; [Bruce's] name calling and belittling behavior, his shoving, his efforts at isolating [Karen] from friends and family, his screaming at home, his isolated but numerous outbursts in public. And I find that this behavior frightened [Karen] and for many years has placed her in fear of being hurt by [Bruce].

Report of Proceedings (RP) (9/5/07) at 10-11. The evidence adduced at trial supports this finding.

At trial, Karen testified extensively about Bruce's calling her names. She also testified that he frequently shoved her. She specifically described one incident when he had shoved her into a wall, shoved her out of the home office, shoved her down the hallway, and then swept everything off her desk. She also described an incident later that same morning, during which he ripped the turtleneck sweater she was wearing:

> I remember him saying I'm going to kill you. . . . I don't know if he said, "I'd like to kill you" or "I could kill you," but there was definitely "kill you" in there. And he—he grabbed both of his hands around my neck and just shoved me against a corner of the wall. And I just remember just being completely—completely horrified, like—you know, in the past in our marriage he had said to me, just kind of in passing just, you know, if he was frustrated with me or whatever, he had said to me a few times in our marriage, "I could snap your neck." And it—Bruce has very large hands. And it has always been very clear to me that he's very strong. And he had pushed me and shoved me in our marriage, but that was—that was a whole new experience. And I was terrified.

3 RP at 450-51. Karen further testified that, starting years earlier, when she was trying to converse with Bruce and he was done talking, he would "shove [her] out of the room and shove

[her] down the hallway." Bruce generally testified that none of these incidents of violence occurred.

The trial court, however, explicitly found Karen's testimony credible and Bruce's testimony not credible:

> I listened to the testimony of the parties and . . . I find that [Karen's] testimony is very credible, and [Bruce's] testimony on the issue of domestic violence is incredible.
>
> [Karen's] testimony appeared from the stand to be genuine. Her description of anger and control was consistent with the behaviors that were described by [the visitation supervisors] during the course of this trial. . . .
>
> The testimony was consistent with [Bruce's] demonstrated disrespect for others and disrespect for rules that he disagrees with. It was my observation that when things did not go as [Bruce] wanted them to, he has acted in a way that those he was dealing with felt intimidated and were frightened.

RP (9/5/07) at 8-9. We will not disturb the trial court's credibility determinations on appeal.[4] *Eklund*, 143 Wn. App. at 212.

C. Parenting Plan Restrictions and Domestic Violence Treatment Order

[4] Bruce's additional argument—that the trial court erred by not finding Karen to be a domestic violence perpetrator—fails for the same reason: We will not disturb the trial court's finding not credible Bruce's testimony that Karen committed domestic violence against him. *Eklund*, 143 Wn. App. at 212. The trial court explained:

> I guess, [Bruce], that you may have been relying on [Karen's] reactive behavior to you to vindicate you and focus attention on her wrongdoing.
>
> I have little doubt that [Karen] threw a glass of water on you once, and she may have even struck back at you. But I cannot conceive that she would have been the physical aggressor. Your public behavior, as reported in this trial, and even the behavior that I have observed in court, belies the truth of these allegations. I do not believe you were ever afraid or felt threatened by [Karen's] behavior, that she controlled your behavior, and in fact that was your testimony. You were never frightened or threatened by her.

RP (9/5/07) at 14-15.

RCW 26.09.187 provides criteria for establishing permanent parenting plans; RCW 26.09.191 provides applicable restrictions for those plans. RCW 26.09.187(2)(b) requires the trial court to "order *sole decision-making to one parent* when it finds that . . . [a] limitation on the other parent's decision-making authority is mandated by RCW 26.09.191." (Emphasis added.) RCW 26.09.191(1) mandates one-parent decision-making authority when the other parent has a history of domestic violence:

> The permanent parenting plan *shall not* require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in . . . a history of acts of domestic violence as defined in RCW 26.50.010(1).

(Emphasis added.) Thus, because the trial court found that Bruce had a history of domestic violence, RCW 26.09.187(2)(b) required it to grant Karen sole decision-making authority for the children.[5]

In addition, RCW 26.09.191(2)(a) requires the trial court to consider a parent's history of domestic violence when determining the parenting plan's residential provisions: "The parent's residential time with the child shall be limited if it is found that the parent has engaged in . . . a history of acts of domestic violence as defined in RCW 26.50.010(1)." RCW 26.09.191(2)(m)(i) further provides that such limitations "shall be reasonably calculated to protect the child from . . . emotional abuse or harm" and may include supervised contact between the parent and child or the parent's completion of relevant counseling or treatment. We hold, therefore, that in light of the

[5] *See Schweickert v. Venwest Yachts, Inc.*, 142 Wn. App. 886, 894, 176 P.3d 577 (2008) (noting that the word "shall" imposes a mandatory duty), *review denied*, 165 Wn.2d 1012 (2009).

trial court's supported finding that Bruce had a history of domestic violence, the trial court did not abuse its discretion by requiring supervision of his residential time with the children.

Furthermore, the trial court's parenting plan restrictions, as follows, were reasonably calculated to address a specific harm—the effect on the children of Bruce's acts of domestic violence against Karen:

> The father shall have four hours of professionally supervised visits per week. Both parties shall agree upon the professional supervisor.
> Once the father enrolls and begins his domestic violence perpetrator treatment program, the professionally supervised visits may [be] in the home of the father. After two months of treatment and a favorable report, unsupervised daytime visits may begin.
> Once the father successfully completes his domestic violence perpetrator treatment program, the parenting plan shall be revisited upon motion and a normalized pattern of contact with the children, including consecutive overnights in the father's home shall occur.

Clerk's Papers (CP) (Cause No. 36875-7-II) at 980.

The trial court explained that it was allowing Bruce supervised visits because he is "truly an engaged parent and a parent who needs to be involved in the lives of these children," RP (9/5/07) at 16, but that Bruce needed to participate in the treatment program to learn how his behavior affects his children. RCW 26.50.060 provides that where the trial court finds that a parent has committed acts of domestic violence, it may order that parent to participate in a domestic violence perpetrator treatment program. *See also* RCW 26.50.025(1) ("Any order available under this chapter may be issued in actions under chapter 26.09 . . . RCW"). We hold, therefore, that the trial court did not abuse its discretion when it imposed the challenged parenting plan conditions.

II. Renewed Domestic Violence Protection Order

Bruce argues that the trial court abused its discretion when it renewed the 2006 domestic violence protection order against him because (1) there has been no contact between Karen and him in the last two years; and (2) she "did not allege any reasonable belief that any of the requirements stated in the definition applied as a basis for her renewal."[6] Br. of Appellant at 33. Bruce also contends that the trial court erred when it refused (1) to strike from the record Karen's certified statement, and (2) to recuse itself from hearing the motion for renewal. These arguments fail.

A. Renewal of Order

In a petition to renew a domestic violence protection order, the petitioner must state the reasons for seeking such renewal,[7] RCW 26.50.060(3), and show past abuse and present fear. *Barber v. Barber*, 136 Wn. App. 512, 516, 150 P.3d 124 (2007). The statute does not require a new act of violence for the trial court to renew a protection order. *Id*. When the petitioner meets these requirements, RCW 26.50.060(3) mandates: "The court *shall* grant the petition for renewal

[6] Karen argues that we should not reach this issue because Bruce did not file a notice of appeal for the protection order currently in effect. Although Karen's argument is technically correct under RAPs 2.2 and 2.4, here, we defer to RAP 1.2(a), which allows us to interpret the Rules of Appellate Procedure liberally "to promote justice and [to] facilitate the decision of cases on the merits." Because of the relatively short duration of each protection order (one year), and because it is likely that this issue may repeat in the future as the trial court renews the original protection order each year, we address the merits of Bruce's challenge to the propriety of the current protection order. *See State v Olson,* 126 Wn.2d 315, 318, 322-323, 893 P.2d 629 (1995).

[7] Because Bruce does not argue that the trial court commissioner's entry of the original protection order was improper, we address only whether the trial court properly renewed the domestic violence protection order.

unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner . . . when the order expires." (Emphasis added.) Karen's petition to renew the domestic violence protection order met these requirements; thus, the trial court was required to renew it.

Karen alleged in her petition: "I want to renew the Order for Protection because the respondent has not completed the domestic violence treatment and I am still in fear of harm from the respondent." CP (Cause No. 36828-5-II) at 467. Her reference to the domestic violence treatment implicitly shows past abuse and she explicitly states that she is presently afraid of Bruce. Thus, Karen met the requirements of *Barber*.

To prove that he would not renew acts of violence against Karen, Bruce relied on his assertions that there had been no *recent* acts or contact. But the statute does not require new or recent acts of domestic violence or contact. *Barber*, 136 Wn. App. at 516. And the trial court, which had also presided over the parties' dissolution, had specifically found that Bruce committed acts of domestic violence and had ordered Bruce to complete domestic violence treatment. But Bruce had not even enrolled, let alone completed, the court ordered domestic violence treatment. We hold, therefore, that the trial court did not abuse its discretion when it extended the protection order.

B. Karen's Statement

At the hearing to renew the protection order, Bruce objected to and moved to strike Karen's certified statement from the record, asserting that she had filed it too late under Thurston County local rules. He argues on appeal that the trial court erred in refusing to strike Karen's

statement. We disagree. The trial court explicitly stated that it was not considering Karen's statement for purposes of the hearing. Because the trial court did not consider the statement, any error in not striking the statement from the record is harmless and not grounds for reversal. *See In re Welfare of M.G.*, 148 Wn. App. 781, 791, 201 P.3d 354 (2009).

III. Remaining Issues

Bruce either assigns error or argues a multitude of other issues that we do not address because of his failure to follow the Rules of Appellate Procedure. These include: (1) the trial court's failure to recuse itself; (2) argument pertaining to a March 18, 2008 interlocutory order, which is not appealable as a matter of right; (3) issues pertaining to orders and decisions of the trial court for which Bruce did not file a notice of appeal; and (4) issues that Bruce does not argue or argues for the first time in his reply brief.

A. Recusal

Bruce argues that the trial court should have recused itself from the hearing because Bruce had filed an affidavit of prejudice against the trial court and because he believed the trial court was biased against him because of his gender. We do not consider this argument because Bruce fails to support it with citation to authority, contrary to RAP 10.3(a)(6). *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (appellate court will not review issues or arguments that a party inadequately briefs).

B. March 18, 2008 Order

Bruce argues that the trial court abused its discretion when it refused to allow him to occupy the family home before refinancing the home.[8] Karen responds, without citation to

authority, that this order is an interlocutory order and is not subject to review. Because subsequent hearings and orders addressed the same matters as the March 18 order, we agree that this is an interlocutory order, which is not appealable under RAP 2.2, and, therefore, decline to review the issue.[9]

C. Orders Not Appealed

Title 2 of the Rules of Appellate Procedure governs which decisions we will review. RAP 2.4 provides:

> SCOPE OF REVIEW OF A TRIAL COURT DECISION
>
> **(a) Generally.** The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal . . . and other decisions in the case as provided in sections (b), (c), (d), and (e). . . .
>
> **(b) Order or Ruling not Designated in Notice.** The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

[8] Bruce contends that the trial court erred when it "refused to award [him] the home absent an absolute refinance and refused to consider the definite arrangement that [he] was able to commit to, which was to take over the mortgage of the family home and have [Karen] quit claim her interest subject to any equity contained in the home at the time of transfer." Br. of Appellant at 40. The March 18 order does not address all of these issues. With respect to the home, the order states only that (1) Bruce "shall continue efforts to refinance the family home," and (2) his "request to occupy the family home is denied." CP (Cause No. 36875-7-II) at 1478.

[9] Furthermore, even if we were to grant review of this issue, Bruce has failed to provide sufficient argument under RAP 10.3(a)(6). Bruce generally cites *In re Marriage of Trubner-Biria*, 72 Wn. App. 858, 866 P.2d 675 (1994) without explanation. Moreover, *Trubner-Biria* is distinguishable. In *Trubner-Biria*, Division One of our court held that the trial court abused its discretion when it refused to allow the husband to occupy the family home pending sale of the home, where the wife had no legal interest in the home. 72 Wn. App. at 861. Here, Karen still had an interest in the home, even if the value of the home was less than the loan to which the property was subject.

Bruce argues that the trial court erred by failing to adopt his version of the child support worksheet. But Bruce did not designate the child support order in a notice of appeal and that order does not meet the exceptions in RAP 2.4(b). Bruce argues that, in spite of this failure, we should reach the issues related to the child support order and dissolution decree because his former counsel added these orders to his appeal. This argument fails.

Neither Bruce nor his former counsel filed a notice of appeal conforming to RAP 5.3. Furthermore, our clerk notified Bruce that the documents would be placed in the file without action because his attempt to add the orders to his appeal did not conform to the Rules of Appellate Procedure. Therefore, we decline to address this issue.

Bruce also argues that the trial court erred by entering additional orders after he had filed his notice of appeal without first complying with RAP 7.2. Bruce has not designated any of these orders in a notice of appeal. Nor does he identify these orders in his brief. Therefore, we do not address this issue. *See Habitat Watch*, 155 Wn.2d at 416 (appellate court will not review issues or arguments that a party inadequately briefs).

D. Issues Not Argued in Opening Brief

Bruce argues several issues for the first time in his reply brief. These issues include: (1) whether the trial court's property distribution in the dissolution decree was an abuse of discretion, including whether the trial court improperly refused to make a proper final disposition of the home;[10] (2) whether the attorney lien on the property was improper;[11] and (3) whether the trial

[10] Even if Bruce had addressed this issue in his opening brief, we would not have addressed it because he did not file a proper notice of appeal for the dissolution decree.

court properly considered the testimony of various witnesses. We will not review these issues.

RAP 10.3(a)(6) requires an appellant's brief to include "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Where an appellant fails to argue an issue in his opening brief, he may not cure the defect in his reply brief. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990)) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); RAP 10.3(c) ("A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.").

IV. Attorney Fees

Both parties request attorney fees under RCW 26.09.140. Alternatively, Karen requests attorney fees because Bruce's appeal is frivolous and because of Bruce's intransigence. We award fees to Karen.

RCW 26.09.140 provides in pertinent part:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.
>
> Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in

[11] Again, this issue does not relate to any trial court decision for which Bruce has filed a notice of appeal.

addition to statutory costs.

Where a party requests attorney fees on the basis of financial need, he or she must file an affidavit of financial need no less than 10 days before the date the case is set for oral argument. RAP 18.1(c). Bruce has not filed an affidavit of financial need; therefore, we deny his request. Karen has complied with RAP 18.1(c) by filing an affidavit of financial need.

We may award attorney fees under RAP 18.9 if the appeal is frivolous or it fails to comply with the Rules of Appellate Procedure. We consider the following factors when deciding whether an appeal is frivolous:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475 (quoting *Streater v. White,* 26 Wn. App. 430, 435, 613 P.2d 187, *review denied,* 94 Wn.2d 1014 (1980)), *review denied*, 131 Wn.2d 1026 (1997). Examining these factors, we conclude Bruce's appeal is frivolous.

Considering the record as a whole, we find no debatable issues. To rule in Bruce's favor on any of his arguments, we would have to ignore the trial court's credibility determinations, which well-settled law precludes us from doing;[12] thus, there was no reasonable possibility for reversal when Bruce filed his appeals. Furthermore, Bruce's repeated failures to comply with the Rules of Appellate Procedure provide a separate basis, under RAP 18.9, to award Karen attorney

[12] *Eklund*, 143 Wn. App. at 212.

fees on appeal.

We affirm and award Karen her attorney fees and costs on appeal, provided that she complies with RAP 18.1.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.